INTHEUNITEDSTATESDISTRICTCOURT FORTHEEASTERNDISTRICTOFPENNSYLVANIA

ROYFULLARD, : CIVILACTION

:

Plaintiff,

v. : NO.00-509

.

ARGUSRESEARCHLABORATORIES,

INC.,

:

Defendant.

Reed,S.J. June6,2001

MEMORANDUM

PlaintiffRoyFullard("Fullard")filedthislawsuitunderTitleVIIoftheCivilRightsAct of 1964,42U.S.C.\(\struct\) of 1964,42U.S.C.\(\struct\) 2000e etseq_.,andtheCivilRightsActof1866,42U.S.C.\(\struct\) 1981,alleging that he was terminated from his position with Argus Research Laboratories, Inc. ("Argus") because of his race. Presently before the Courtist hemotion of defendant for summary judgment (Document No.16), pursuant to Rule 56 of the Federal Rules of Civil Procedure, the response, reply and sur-reply thereto. For the following reasons, the motion will be granted.

I. Background²

Fullard,anAfrican-American,washiredbyArgusonoraboutApril14,1997asa

QualityAssurance("QA")Auditor.QAAuditorsreviewthecompany'sanimalresearchto
ensurethatitisconductedaccordingtoindustryandcompanyprotocols.Fullardessentially

See

¹ Becausethiscaseraisesafederalquestion, jurisdictionisproperpursuantto 28U.S.C.§1331.

 $^{^2\} The facts laid out in this opinion are based on the evidence of record viewed in the light most favorable to the plaint if fRoyFullard, the nonmoving party, as required when considering a motion for summary judgment. <math display="block">\underline{Carnegie Melon University v. Schwartz}, 105F.3d863, 865 (3dCir.1997).$

claimsthathismanager, Kathleen Moran ("Moran"), unfairly reprimanded himon many occasions for engaging in activities for which his white co-employees were not similarly rebuked. He further alleges that he was placed on probation and ultimately discharged for discriminatory reasons. Fullard contends that he was terminated in a manner in consistent with Argus' usual practice of giving employees the tools to improve and keeping the minits employ in an effort to help them succeed. Arguses sentially contends that both Fullard and a similarly situated white employee, Sharon Gogel ("Gogel"), we replaced on probation for causing disruptions in the department and challenging Moran's authority. Gogel had transferred into Moran's division around the same time that Fullard began his employment. Gogel worked out her problems and was retained. Fullard, on the other hand, would not accept the terms of his probation and continued to work the least hours of anyone in the department. Thus Argus maintains that Fullard's termination was not the result of racial discrimination, but rather his own conduct.

II. LegalStandard

IndecidingamotionforsummaryjudgmentunderRule56oftheFederalRulesofCivil

Procedure, "thetestiswhetherthereisagenuineissueofmaterialfactand, ifnot, whetherthe

movingpartyisentitledtojudgmentasamatteroflaw." MedicalProtectiveCo.v.Watkins ,198

F.3d100,103(3dCir.1999)(citing Armbrusterv.UnisysCorp. ,32F.3d768,777(3dCir.

1994)). "Astomateriality, the substantive law willidentify which facts are material. Only

disputes overfacts that might affect the outcome of the suitunder the governing law will

properly preclude the entry of summaryjudgment." Andersonv. Liberty Lobby, Inc. ,477U.S.

242,248,106S.Ct.2505,91L.Ed.2d202(1986). Furthermore, "summaryjudgment will not

lieifthedisputeaboutamaterialfactis 'genuine,' thatis, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." <u>Id.</u> at 250.

Onamotionforsummaryjudgment,thefactsshouldbereviewedinthelightmost

favorabletothenon-movingparty. See MatsushitaElec.Indus.Co.v.ZenithRadioCorp.____,475

U.S.574,587,106S.Ct.1348,89L.Ed.2d538(1986)(quoting UnitedStatesv.Diebold,Inc.___,

369U.S.654,655,82S.Ct.993,8L.Ed.176(1962)) .Thenonmovingparty"mustdomore

thansimplyshowthatthereissomemetaphysicaldoubtastothematerialfacts," Matsushita,475

U.S.at586,andmustproducemorethana"merescintilla"ofevidencetodemonstrateagenuine

issueofmaterialfactandavoidsummaryjudgment. See BigAppleBMW,Inc.v.BMWofNorth

America,Inc. ,974F.2d1358,1363(3dCir.1992).

III. Analysis

Plaintiffclaimsdefendantintentionallydiscriminatedagainsthimbecauseofhisracein violationofTitleVIIoftheCivilRightsActof1964,42U.S.C.\\$2000e, etseq_andtheCivil RightsActof1866,42U.S.C.\\$1981.Thelegalstandardforasection1981caseisidenticalto thestandardinaTitleVIIcase. See Lewisv.UniversityofPittsburgh__,725F.2d910,915n.5 (3dCir.1983); Bullockv.Children'sHospitalofPhiladelphia__,71F.Supp.2d482,485(E.D.Pa. 1999).Thus,IwillanalyzeFullard'sclaimonlyunderTitleVIIbelow;however,myanalysis andconclusionsareequallyapplicabletohisclaimofdiscriminationinviolationofsection1981.

See Harrisv.SmithklineBeecham_,27F.Supp.2d569,576(E.D.Pa.1998)(applyingsame standardtoTitleVII,\\$1981,PHRAandADEAclaims).

Full ard may sust a in his Title VII claim by presenting direct evidence of racial discrimination or by using circumstantial evidence that would allow are a sonable fact finder to

inferdiscrimination. <u>See Starceskiv.WestinghouseElec.Corp.</u>__,54F.3d1089,1095n.4(3d Cir.1995); <u>seealso PriceWaterhousev.Hopkins</u>_,490U.S.228,244-46,109S.Ct.1775,104L. Ed.2d268(1989)(establishingframeworkformixedmotivecasesthatinvolvedirectevidence); <u>McDonnellDouglasCorp.,v.Green</u>_,411U.S.792,802-04,93S.Ct.1817,36L.Ed.2d668 (1973)(establishingframeworkforpretextcasesthatinvolvecircumstantialevidence).

Intheabsenceofdirectevidenceofdiscrimination, aplaintiffmayproceedunderthe burdenshiftingparadigmof McDonnellDouglas and itsprogeny. See St.Mary's Honor Ctr.v.

Hicks, 509U.S. 502, 506, 113S. Ct. 2742, 125L. Ed. 2d407(1993); McDonnellDouglas Corp.

v. Green , 411U.S. 792, 802, 93S. Ct. 1817, 36L. Ed. 2d668(1973); Simpsonv.KayJewelers,

Div. of Sterling. Inc. , 142F. 3d639, 643-44(3dCir. 1998). To survive summary judgment, the plaintiff must first prove by a preponderance of the evidence that a primafacie case of discrimination exists. See Reevesv.SandersonPlumbingProducts, 530U.S. 133, 143, 120S. Ct.2097, 147L. Ed. 2d105(2000); Stanzialev.Jargowsky, 200F. 3d101, 105(3dCir. 2000).

Toestablishprovea *primafacie* caseofracediscrimination,Fullardmustshowthat(1) heisinaprotectedclass,(2)isqualifiedfortheposition,(3)sufferedanadverseemployment action,and(4)wasdischargedundercircumstancesthatgiverisetoaninferenceofunlawful discrimination. See Pivirottov.InnovativeSys.,Inc. _,191F.3d344,357(3dCir.1999); Waldron

³ Directevidenceisovertorexplicitevidencewhichdirectlyreflectsdiscriminatorybiasbyadecision-maker. <u>See Armbrusterv.UnisysCorp.</u>,32F.3d768,778-79,782(3dCir.1994)(analogizingdirectevidencetothe proverbial"smokinggun").Indirectevidenceisevidenceofactionsorstatementsfromwhichonemayreasonably inferdiscrimination. <u>See Torrev.Casio,Inc.</u>,42F.3d825,829(3dCir.1994).Here,plaintiffhasonlypresented indirectevidenceofrace.Noneofplaintiff'sevidence"proves[race]discriminationwithoutinferenceor presumption." <u>Nixonv.Runyon</u>,856F.Supp.977,983(E.D.Pa.1994)(quoting <u>Brownv.EastMiss.Elec.Power Ass'n.</u>,989F.2d858,861(5 thCir.1993)).

<u>v.SLIndus.,Inc.</u>,56F.3d491,494(3dCir.1995) .Commoncircumstancesgivingrisetoan inferenceofunlawfuldiscriminationincludethehiringofsomeonenotintheprotectedclassasa replacementorthemorefavorabletreatmentofsimilarlysituatedcolleaguesoutsideofthe relevantclass. <u>See Bullock</u>,71F.Supp.2dat487.

"Similarly-situated" has been defined as those individuals who have engaged in the same conductas plaintiff, "without such differentiating or mitigating circumstances that would distinguish their conductor the employer's treatment of them for it." Id. at 489 (citations omitted). In order to invoke a presumption of discrimination, plaintiff must show that he was subjected to less favorable treatment than the similarly situated person not within his protected class. See id. at 490.

Whileaplaintiff maymakeouta primafacie casewithevidencethatsimilarlysituated individualsweretreatedmorefavorably, as the Court of Appeals clarified, however, such proof isnotrequired. See Pivirotto, 191F.3dat356-57. Aplaintiff can make out a primafacie case evenwithoutdemonstratingthatemployeesoutsideoftherelevantclassweretreatedmore favorably, letalone that the plaint if fwas replaced by some one outside of the relevant class. See id.at357Matczakv.FrankfordCandy&ChocolateCo. ,136F.3d933,939(3dCir.1997)(in ADAclaim, showing favorable treatment outside of the protected classis not are quired element of a primafacie case); Bullock,71F.Supp.2dat489.Thereisnorigidformulationofa prima faciecaseandtherequirementmayvarywith"differingfactualsituations." Matczak,136F.3d at 938 (quoting McDonnell Douglas, 411 U.S. at 802 n. 13). The *primafacie* caserequires"only 'evidenceadequatetocreateaninferencethatanemploymentdecisionwasbasedonanillegal discriminatorycriterion." See Pivirotto, 191F.3dat356(quoting O'Connorv.Consolidated

CoinCaterersCorp. ,517U.S.308,312,116S.Ct.1307,1310,134L.Ed.2d433(1996)).

Nevertheless,theplaintiffmustultimatelyprovebyapreponderanceoftheevidencethata primafacie caseofdiscriminationexists. See Bullock,71F.Supp.2dat490.Demonstrating onlyamerepossibilityofdiscriminationwillnotsuffice. See id.

ArgusdoesnotdisputethatasanAfrican-American,Fullardisinaprotectedclass,and thathewasqualifiedfortheposition.Heclearlysufferedanadverseemploymentactionwhenhe wasplacedonprobation,andeventuallyterminated.Defendantdisputesthefinalelementofthis analysis-whetherornotFullardwasdischargedundercircumstancesthatgiverisetoan inferenceofunlawfuldiscrimination.Fullardpointstonumerousincidentsinwhichhealleges hewasunfairlysingledoutandwhichculminatedinhisprobationandlaterterminationonthe basisofhisrace.

First,onoraboutFriday,September17,1997, ⁵Fullardcontendshewaswrongly reprimandedforleavingworkearly.Fullardclaimsthatafterworkingaseven-hourday,he reachedhisfortyhoursfortheweekandwenthomejustashehadseenhisallhiswhitepeersdo

⁴ DefendantfirstarguesthatbecauseMoranbothhiredandfiredFullard,thereisapresumptionthatno discriminationexists.Partiesspendconsiderabletimebriefingthisissue.Defendantrelieson <u>Proudv.Stone</u>,945 F.2d796,797(4 thCir.1991),tosupportitsproposition,however,theCourtofAppealsfortheThirdCircuithas expresslydeclinedtoaccordthesameconclusiveweighttothesituationofthesamepersonactingashirerandfirer. <u>See Waldronv.S.L.Indus.,Inc.</u>,56F.3d491,494(3dCir.1995); <u>Schmidtv.MontgomeryKone,Inc.</u>,69F.Supp. 2d706,711(E.D.Pa.1999).

In <u>Waldron</u>,theCourtofAppealsconcludedthat"where,asin <u>Proud</u>,thehirerandfirerarethesameand thedischargeoccurredsoonaftertheplaintiffwashired,thedefendantmayofcoursearguetothefactfinderthatit shouldnotfinddiscrimination.Butthisissimplyevidencelikeanyotherand *shouldnotbeaccordedany presumptivevalue*." Waldron,56F.3dat406n.6(emphasisadded).

Defendantarguesthat Moranalone made the decision to hire and later fire plaint iff. Plaint iff counters that Morandid not have solere sponsibility for either hir ingorter minating plaint iff. If ind that while there appears to be a dispute a stowhether Moran was the sole decision maker for both employment decisions, the issue is not dispositive and the relevant testimony would merely serve a spotentially admissible evidence.

⁵ ItisjudiciallynotedthatSeptember17,1997wasaWednesday,andthereforeitislikelythatFullard meanttorefertoFriday,September19,1997.

onoccasion.(FullardDep.at76.) Hetestifiedathisdepositionthatthisliberalleavepolicy existedinhisdivision.(Id.at58,83.)Fullardfurthertestifiedthathedidnottellanyonehewas leavingearlyonthedayinquestionbecausehehadwitnessedallotherQAAuditorsleaveearly withoutaskingpermission.(Id.at77.)Atanotherpointinhistestimony,however,inresponse tothequestion, "IsitpossiblethattheCaucasianemployeesaskedpermissionbeforetheyleft workwithonlyworking7hoursinaday?"Fullardresponded, "Anythingispossible."(Id.at 84.)

GogeltestifiedatherdepositionthatwiththeexceptionofFullard,shedidnotrecall anyonebeingreprimandedforleavingearlyaslongastheemployeehadworkedaforty-hour week.(GogelDep.at66.)However,shealsotestifiedthattheauditorsalwaysaskedpermission beforeleavingearly.(Id.at64.)Inaddition,QAAuditorHeatherRabbutino("Rabbutino") testifiedatherdepositionthattherewasnopolicyallowingemployeestoleaveafterworking40 hoursfortheweek.(RabuttinoDep.at85.)Thus,whiletheremaybeadisputeastowhether thereisaliberalleavepolicyatArgus,Fullardhasproducednoevidencebeyondhissubjective opinionthatthepolicywastobeexercisedwithoutfirstseekingpermissionfromasupervisor. Ultimately,MorantoldFullardnottoleaveearlyagainwithoutaskingherpermission.(Fullard Dep.at77.)

ThesecondincidentoccurredatastaffmeetingheldonoraboutSeptember20,1997.

Fullardcontendsthatstaffmeetingsareheldinanopenforumformat,meaningthatemployees areinvitedtoexpresstheiropinions.(Id.at92.)Atthisparticularmeeting,Morandiscusseda departmentaldecisiontoallowanauditortoworkpart-timefromhome.Fullardvoiced oppositiontothisdecision,believingitwouldcreatemoreworkfortheQAAuditorsinthe

office. (<u>Id.</u>at93.)Hecouldnotrememberwhetheranyotherauditorsexpressedsimilar objections. (Id.) Afterthemeeting, heclaims that Moran reprimanded him by telling him "never toquestion[her]departmentaldecision."(Id.at95.)Gogeltestified,however,thatsherecalled thatFullardvoicedhisopinionandthenGogelandKietLuong("Luong"),anotherQAAuditor, chimedintheir support of Fullard's objections, and that Moran "got really ticked off" at allthree employees for questioning her authority. (Gogel Dep. at 74.) Rabbutino declared by affidavit thatmanyauditorscomplainedaboutthepart-timepolicy.(RabbutinoAff.at¶6.)Whileit appearsthatFullardsubjectivelybelievedhewassingledoutforaprivatereprimand, such a beliefdoesnotconstituteevidenceofdiscrimination. Seee.g. Dilly.CommonwealthofPa. ,3F. Supp.2d588,591-92(E.DPa.1998). Thereasonable inference is that Morandid not tolerate employeesquestioningherauthority, notthat sheheld any racial animus toward Fullard. This inference finds additional support in the fact, discussed in detail below, that Moranal soplaced Gogelonprobationinpartforquestioningherauthority.

ThenextallegedincidentoccurredonoraboutSeptember26,1997.Fullardneededto
leaveworkearlytopickuphissonfromschool,however,hehadnotyetcompletedastudythat
wasduethatday.Hebelievesthatheaskedtwocolleagues,RabbutinoandLaurieVeneziale
("Veneziale"),toreviewhissummaryandcompletethepagecount.(FullardDep.at84.)
Fullardallegesthatthenextday,heheardfromhisco-employeesthatMorancoercedRabbutino
andVenezialeintotellingherthatFullardhadforcedthemtodohiswork.(

Id.at85.)Fullard
couldnotrememberwhetherheandMoranactuallydiscussedtheincident.(

Id.at88.)
RabbutinotestifiedthatsheoverheardFullardaskVenezialeandLuongtocompletethereport.
(RabbutinoDep.at89.)RegardlessofwhetherFullardorderedorrequestedco-employeesto

finish his work, he does not claim that he asked permission from Moran before leaving. Thus even viewed in the light most favorable top laint iff, the evidence shows that he left work early without permission and without finishing his assignments.

Aroundthistime,FullardinformedMoranthathewouldnotbeabletomakeamorning staffmeetingbecausehehadtoattendacriticalphaseaudit.AccordingtoFullard,allQA Auditorsmissedstaffmeetingsiftheyneededtogotoacritical-phaseaudit.(FullardDep.at 101.)Fullardtestifiedthatwhilehewasnotformallyrebuffed,MoranquestionedwhyFullard couldnotfinishthereportatanothertime,butultimatelyallowedhimtomissthemeeting.(Id.)

OnoraroundOctober31,1997,MoransentFullardandanotherminorityQAAuditor,
Luong,hometochangetheirattirebecausetheyworejeanstoworkcontrarytocompanypolicy.

(Id_at105.)FullardcontendsthatVeneziale,awhiteQAAuditor,wasalsowearingjeans,but
wasnotaskedtogohomeandchange.(Id_at108.) GogeltestifiedthatVenezialeworejeans
andsneakersallthetimewithoutquestion.(GogelDep.at59-60.)CompanyPresidentAlan
Hoberman("Hoberman")testifiedthatwhiletherewasnodressdownpolicyallowingjeans,he
alsothoughtitwas"inappropriate"thatMoransentthetwoemployeeshometochange.

(HobermanDep.at33.)

OnJanuary16,1998,MoranrequestedthatFullardremoveazodiacsignhehadhanging inhiscubicle.(FullardDep.at137.)Gogelapparentlyhadthesamesignhanginginhercubicle andwasneveraskedtoremoveit.(<u>Id.</u>)MoranclaimsshewasunawareofGogel'ssign. (<u>Id.</u>)

Underlying each of these episodes was the fact that Fullard worked less hours than the rest of the full-time QAA uditors. Fullard test if ied that he knew that over time work would sometimes be required in his job. (Fullard Dep. at 58.) Hourly records indicate that with the last of the full state of the fact that with the last of the fact that the

singleexceptionofthemonthofJuly,1997,Fullardworkedtheleastamountofhoursonany full-timeemployeeinhisdivision.(Def.'sEx.K.)HeistheonlyfulltimeQAAuditorwho *never*worked45hoursormoreaweek.(<u>Id.</u>)FromtheweekendingApril19,1997through Fullard'slastweekofemploymentwhichwastheweekendingJanuary24,1998,Fullardworked atotalof1641.70hours.(<u>Id.</u>)Theotherfull-timeco-employeesrespectivelyworked:1834.20 hours,2565.50hours,2033.70hours,and1911.10hours. ⁶(<u>Id.</u>)

Whilenoneoftheseepisodestakenaloneresultedinanydisciplinaryaction,itappears thatthecumulativeeffectoftheseincidentsledFullard'sonaninetydayprobationandultimate termination. Beforetheprobationdecisionwasmade, Moranhadcommunicated with the Directorof Human Resources, Marie Di Daniels ("Di Daniels") in September of 1997, that both Fullard and Gogelwered is rupting the Department and question in gherauthority. (Di Daniels

 $^{^6 \} Fullard argues that this Court cannot consider the summary of time records presented by Argusbecause they are not admissible evidence for summary judgment purposes. (Def.'s Ex.K.) Specifically, he appears to argue that since the actual records are kept in Massachusetts the summaries were created during litigation and therefore cannot qualify as business records admissible under Federal Rule of Evidence 803(6). Defendant aptly responds by filing an affidavit of Carol Kline ("Kline"), the current Director of Human Resources in cluding the original records from which the summary was prepared. Defendant also rightly directs this Court to Federal Rule of Evidence 1006 which allows for the admission of summary documents. Thus, Defendant has demonstrated the admissibility of the summary of time records.$

Fullardalsoarguesthatthedocumentsareactuallybillingrecords,thusclaimingthatFullardwasactually workingmorethan40hoursaweekifhewasbilling40hoursmostweeks. ThisCourtnotesthatthesamecouldbe saidoftherestoftheQAAuditorswhowereclearlyworkingmanymorehoursthanFullardiftheywerebilling manymorehoursthanFullard. WhileFullardmaygainpointsforcreativity, therecordstillclearlyshowsthathis hours (bothinactual time and in billables) pale incomparison to his co-workers.

Full ard also contends that there existed no clear over time schedule. (Full ard Dep. at 58.) However, the summary records clearly show that his co-employees managed to put in more over time hours despite the possible lack of scheduling.

Finally, Fullard posits that he was simply a more efficient worker. (Id.) However, even viewed in the light most favorable to plaint iff, there cords till indicates that Fullard worked (and billed) the least amount of hours in his division.

Titisunclearwhetherthejeansepisodeoccurredbeforeorafterthereview.Itlikelyoccurredafterwards becauseplaintiffcontendsthatitoccurredonOctober31 standhesentane-mailregardinghisreviewonOctober 30th.(Def.'sEx.P.)Thus,boththejeansincidentandtheremovalofthezodiacsignincidentoccurredduring Fullard'sprobationperiod.

Dep.at39.)TherecorddoesnotincludedescriptionsofspecificincidentsillustratingMoran's problemswithGogel.GogelandFullardalsocomplainedtoDiDanielsthatMoranwasshowing favoritismtoRabuttinoandnotmanagingherdepartmentwell.(Id.at40-41.)Asaresultof theseofficeproblems,Argushiredanoutsideconsultant,RobertEddy("Eddy"),toworkwith Moran.EddysuggestedthatMoranplace bothGogel andFullardonanextendedtrialperiod. (Def.'sEx.M.)

InlateOctober,Moran,DiDanielsandFullardmetforFullard'ssix-monthreview,at whichpointFullardwasplacedonathree-monthprobationperiod. Thefollowing areaswere outlined as goals for improvement: (1) regular attendance, (2) devoting the needed time, (3) accepting responsibility, (4) cooperating with all coworkers, (5) maintaining acourteous professional manner with all coworkers, (6) working as a team member, and (7) functioning on a stage that plans and sets appropriate priorities rather than from a directive. (Def.'s Ex.0.)

 $In addition, Argus made the following available to Fullar dinane ffort to help him improve: (1) Conflict, Critism[sic], and Angeraudio tape, (2) Communication that works audio tape, (3) Making Teamwork Work audio tape, (4) How to Deal With Angerbook, (5) Your Attitude is Showing book, (6) Conflict Management book, and (7) Working with Difficult People book. (\underline{Id.})$

Fullardrefusedtosignthereviewbecausehedidnotagreewiththecritique. OnOctober 30,1997,Fullardsentane-mailtoMoranstating,"IwillreturnthereviewbutIwillnotsignthis documentbecauseIdonotagreeatall."(Def.'sEx.P.)Thefollowingexchangeoccurredathis deposition:

Q: Didyouinterpretthe...review[]asrequiringyoutotakecertainstepsto

improveyourperformance?

A: Ididn'tinterpretanything,becauseIdidnotagree.

Q: Didyouinterpretitasmeaningifyoudidn'tdocertainthings, youmight notbeemployed by the company?

Q: AsIjuststated,Ididnotinterpretitanyway,becauseIdidnotagree.It wasasimpleIdonotagree.

(FullardDep.at121.)FullardalsotestifiedthathetoldHobermanthathe"couldn'tworkover 40hoursuntilwecouldresolvetheseproblems[withMoran]."(Id.136-37.)

Despitethisclearevidenceofnoncompliance, Fullardarguesthatitisrelevantthathe neverstatedtoMoranthathewasunwillingtoworkovertime.(Pl.'sResp.at10.)Inotefirst thatMorantestifiedthatFullarddidtellherthathewouldnotworkovertime.(MoranDep.at 38.)Inaddition,DiDanielstestifiedthatwhenshe,MoranandFullardmetforhissixmonth review,Fullard"attemptedtorefutethings[Moran]said,andindicatedthathewouldnotbe compliantwithsomeofherdirection."(DiDanielsDep.at60.)CarolKline("Kline"),who succeededDiDaniels, also testifies that Fullard toldher that "aslong as [Moran] was in charge of thatdepartment,[Fullard]wouldnotworkovertime."(KlineDep.at30.)Moreover,while FullardneverdirectlytestifiedthathetoldMoranhewasnotgoingtoworkbeyond40hoursper week, heals one verdenied making such a statement. More importantly, the evidence clearly showsbyFullard'sownadmissionsthatherefusedtoaccepttheareaswhichMoranhad highlightedasneedingimprovement, two of which were "regular attendance" and "devoting the neededtime."Hishoursdidnotincrease, and Moran continued experiencing problems with him. (DiDanielsAffidavitat¶8.)EvenviewedinthelightmostfavorabletoFullard,therecordis clearthatFullardactedindefianceofhisprobation,includingrefusingtoworkovertime.Fullard wasterminatedon January28,1998.

ApproximatelyonemonthbeforeFullardwasplacedonprobation,Gogelwassimilarly disciplined.ThegoalsoutlinedforGogelwereasfollows:(1)keepingtobusinessissuesrather thaninterpersonalgoals,(2)workingforthegoodofthedepartmentratherthanonapersonal level,(3)bringingproblems/concernsthroughtheproperchannels,(4)slowingdownand thoroughlycomprehendingtheprocessesofyourwork,(5)completingthetrainingfile documentation,(6)revisingthecriticalphaseforms,and(7)revisetwochaptersinthecritical phasetrainingmanual.(Def.'sEx.0.)Gogelwasgiventheexactsameaudiotapesandbooksas Fullardhadreceived.(Id.)

InstarkcontrasttoFullard'sreactiontoprobation,Gogel,despiteherdisagreementwith Moran'sevaluationofherwork,signedherreviewandworkedonheridentifiedweaknesses.

(GogelDep.at99-104.)Specifically,thefollowingexchangeoccurredduringGogel's deposition:

Q. Now, Iknowyousaidyoudisagreedwith this review. Didyouevertell Ms. Moranor Ms. DiDanielsoranyone else that you wouldn't take any action in response to this review?

. . . .

A. Absolutelynot....Itakeconstructivecriticismtoheart....Itriedmybesttodothe thingsonhere.

(<u>Id.</u>at103-04.) Beforetheendofherninetydayprobationaryperiod,Gogeltransferredtoa differentdepartmentwithinArgusandwasneverterminated.

FullardarguesthatGogelisasimilarlysituatedemployeeoutsidehisprotectedclasswho wasmorefavorablytreated. The differing responses Gogeland Fullardhadtotheir respective probations lead metoconclude that plaintiff cannot present evidence from which are a sonable jury could conclude that Gogelwas a similarly situated white employee who was more favorably

treatedthanFullard.Gogelwasnotsimilarlysituatedbecauseshebehavedquitedifferentlyfrom Fullard.ThefactthatGogelacceptedcriticism,irrespectiveofthefactthatshefeltthecriticism maynothavebeenwarranted,andworkedtochangeherworkplaceproblemswithMoran, distinguishtheirconduct. See Bullock,71F.Supp.2dat490(defining"similarlysituated").

IalsoconcludethatthefactthatMoranplacedbothawhiteemployeeandanAfricanAmericanemployeeonprobation,coupledwiththefactthatbothemployeesperceivedthis
actionasunfounded,createsaninferencethatMoranwasnottreatingFullardlessfavorably
whichFullardhasnotcontradicted.Putanotherway,becauseMoranclashednotonlywith
Fullard,whoisAfricanAmerican,butalsowithawhiteemployee,theonlyreasonableinference
isthatMoranwasstrugglingtomanageherdepartment,notthatshehadanyracialanimus.

9 The
factthatshesufferedfrommanagementproblemsissupportedbythefactthatArgushiredan
outsideconsultanttohelpher. TheCompanyPresidentconcededthathetoldMoransheneeded
toimprovehermanagementskills.(HobermanAff.at¶5.)Poormanagement,however,does

 $^{^8 \} Full ard also attempts to compare himself to Moran, who suffered from management problems, but was not fired. The record, however, contains no evidence concerning how Argustreated Moranasan employee. It is unknown if she was ever placed on probation, and if so, how she responded. Thus the reis in sufficient evidence to conclude whether or not Moran could be compared to Fullard$

 $^{^9 \} Fullard spends considerable time briefing the fact that during her deposition, Moran was unable to recall many of the events which led to Fullard's termination and needed her memory refreshed. This Courtack now ledges that Morandid indeed struggle with her memory and that much of the evidence produced by Argus comes from deposition testimony of other Argus employees recalling their conversation with Moran at the time of Fullard's employment at Argus.$

Full ard argues that the deponents lacked first-hand knowledge of the events and that such evidence is therefore in a dmissible as he arsay for the purposes of summary judgment. Defendant counters that Argusis not offering such evidence for the truth of the matter asserted, but rather to show Moran's state of mind. This Court agrees with defendants that such evidence would be admissible for those purposes.

In addition, In ote that much of Argus' evidence also concerns Fullard's own deposition testimon yand an email where he conceded that he disagreed with an drefused to accept his probation.

Fullardalsoallegesthathistermination was contrary to Argus' policy of helping employees become better at their job instead of firing them. This Court finds that all the evidence shows that Argus gave both Fullardand Gogelase condchance, and that only Gogel took advantage of the opportunity. Thus, there is no permissible inference that Argustreated Fullard differently.

10

Theremaining incidents on which Fullar drelies likewise fail to demonstrate inferences of racial animus. Ast othed ay Fullar dleftearly, he was unable to point to any evidence that there was a company policy of liberal leave without first seeking permission. Ast other eprimand regarding his voicing his opinion at the staff meeting, the evidence shows that Morandid not to lerate any employee questioning herauthority. Ast othed ay Fullar dleftearly because of his son, the evidence still shows that Fullar dleft work without permission and before completing his work. All that remains is that Moran unfairly questioned why he was missing a meeting, and two incidents which occurred after Fullar dwas placed on probation: the time he was sent home to change out of his jeans, and the time he was forced to remove a zodiac sign from his work station. At best, the seincidences show that Argus was occasionally fast idious with respect to managing Fullar d's conduct, but they could not leadare a son able fact finder to conclude that Fullar dhad proven by a preponder ance of the evidence that plaint if fsuffered racial

Onasimilarvein, Fullardsuggeststhatitissomehowrelevantthathedoesnotrecallwhetherhewastold aboutthesixmonthreviewandtestifiedthattheinitialsonthedocumentclaimingthatheunderstoodthepolicywere nothis. (FullardDep.at69.) While Fullard's memory may serve to raise adispute astowhether hewasin fact shown the six monthreview policy, the recordals oshows that Gogel was also reviewed after six months, thus I find no inference of intentional discrimination with respect to whether the six-month review was valid.

discrimination.¹¹

IV. Conclusion

Fortheforegoingreasons, this Court concludes that no reasonable jury could, upon the evidence proffered by plaintiff, find that he was discriminated against by his employer because of his race; thus, the motion of defendant for summary judgment will be granted. An appropriate order follows.

 $^{^{11} \} Fullard also turns to Gogel's statement inher affidavit that she believed that Fullar dtreated differently because of his race. (Gogel Aff. at 2.) As this Court has concluded, however, Fullard has failed to direct this Court to incidents which would persuade are a sonable fact finder to find that Argus discriminated against Fullard because of his race. \\$

INTHEUNITEDSTATESDISTRICTCOURT FORTHEEASTERNDISTRICTOFPENNSYLVANIA

ROYFULLARD, : CIVILACTION

:

Plaintiff,

.

v.

ARGUSRESEARCHLABORATORIES,INC.,

:

Defendant. : NO.00-509

ORDER

ANDNOW onthis6 th dayof June, 2001, upon consideration of the motion of defendant Argus Research Laboratories, Inc., for summary judgment (Document No. 16) pursuant to Rule 56 of the Federal Rules of Civil Procedure, the responses, reply, and sur-reply thereto, and having concluded for the reasons set for thin the foregoing memorand um that there is no genuine is sue as to any material fact and that defendant is entitled to judgment as a matter of law, it is hereby **ORDERED** that the motion is **GRANTED**.

 $\label{lem:JUDGEMENT} \textbf{JUDGEMENT} is hereby \quad \textbf{ENTERED} in favor of Argus Research Laboratories, Inc. and against Roy Fullard.$

Thisisafinalorder.

LOWELLA.REED,JR.,S.J.	